In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 277

MARVIN JOHNNY PERRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 1a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1964. The petition for a writ of certiorari was filed on July 14, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court's instructions sufficiently protected petitioner against improper consideration of evidence relating to his criminal record.

STATEMENT

After a waiver of indictment and a jury trial in the United States District Court for the Eastern District of North Carolina, petitioner was convicted on two counts of a criminal information charging removal and concealment of non-taxpaid whiskey in violation of 26 U.S.C. 7206(4). He was sentenced to concurrent terms of imprisonment for three years. The court of appeals affirmed (Pet. App. 1a).

An investigator for the Internal Revenue Service testified that, working in an undercover capacity and with a government informer, he went to petitioner's residence upon two occasions in July, 1962, and each time purchased "moonshine" whiskey from petitioner (Tr. 3-11).[1] On cross-examination the investigator denied that he had visited petitioner before the first sale (Tr. 13) or that he had heard petitioner say that he was not going to sell him liquor (Tr. 22). Another agent of the Revenue Service testified that petitioner admitted, in an interview after arrest, that he had sold the liquor (Tr. 37).

Petitioner testified that the investigator and the informer, with whom he had been friendly, had visited his residence three or four times prior to the day that

[1] Record references are to the original transcript of trial proceedings, a copy of which we are lodging herewith.

they received the first quantity of liquor (Tr. 60-62). Even so, petitioner said, it was not he, but his wife's nephew, who sold the whiskey, and that he merely helped load the whiskey on the second occasion (Tr. 54-58). He said that when he was asked about providing whiskey he replied that he would mention the request to anyone he saw who might supply it, but that thereafter he always answered "no" to the inquiry whether he had found a source, adding that he had just been released from the penitentiary (in March 1962) and did not want to go back (Tr. 60, 53-54).

On cross-examination petitioner admitted federal and State convictions involving the manufacture, possession, and sale of illegal whiskey ranging over a period from 1939 to 1961 (Tr. 63-66).

Motions for acquittal on the ground of entrapment were denied at the conclusion of the Government's case and at the close of all the evidence (Tr. 51, 70).

In its charge to the jury the court, after instructing as to the presumption of innocence and the burden of the government to prove guilt beyond a reasonable doubt, said (Tr. 71):

> In this case the defendant has entered a plea of not guilty to each of the charges against him and has thus raised the defense of entrapment. The Court charges you that when the defense of entrapment is raised, the predisposition and criminal design and intent of the defendant become relevant; and the evidence relating to the predisposition of the defendant and his record and reputation for violations of law may be considered by you as it bears on the issue of entrapment.

Thereafter the court reviewed all the evidence relied upon by the parties, reciting, *inter alia*, admissions by petitioner as to his criminal record (Tr. 74-82). After stating that the evidence raised questions of fact to be determined, the court read the two counts of the information and the statute involved, and listed the elements of the crime (Tr. 82-85). It defined entrapment, explaining that the government had the burden of proving beyond a reasonable doubt that the defendant was not unlawfully entrapped (Tr. 85-86) and charging that, even if the jury found that the defendant committed the offenses charged in the information, it would be its duty to find the defendant not guilty if it found that he was unlawfully entrapped (Tr. 87). After a colloquy at the bench, inaudible to the jury, as to the weight to be accorded petitioner's prior record, the court told the jury that counsel had called his attention to the fact that, in his prior instruction on entrapment he had referred to record and reputation, but that there was no evidence as to reputation in this case. He then repeated his instruction as follows (Tr. 91):

> The Court charges you that when the defense of entrapment is raised, the predisposition and criminal design and intent of the defendant becomes relevant; and evidence relating to the predisposition of the defendant and his record for violation of laws may be considered by you as it bears on the issue of entrapment.

ARGUMENT

In view of the fact that both early and at the very last part of his charge, the judge told the jury that

petitioner's prior record might be considered as it bore on the issue of entrapment, it is difficult to understand petitioner's argument that the court did not properly limit the consideration of the defendant's criminal record to his predisposition to commit the crime. It is true that the court, in detailing the government's contentions, included admissions made by petitioner on cross-examination as to his criminal record (see Tr. 80). Before and after this, however, the court instructed that the evidence relating to petitioner's predisposition and record for violations of law was to be considered *on the issue of entrapment*. The jury could not have been confused as to the purpose for which it was to consider the evidence of prior crimes.

The instruction did not suggest that the jury could use the evidence in determining credibility. This was advantageous to petitioner rather than prejudicial.

It is also true that the court in a bench conference indicated that he thought the evidence of petitioner's criminal record was general evidence which could be considered as substantive evidence on the question of guilt or innocence (Tr. 89-90). This colloquy was inaudible to the jury however (Tr. 88), and the court's actual instructions expressed a contrary view.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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